PHYSICIANS RESEARCH INSTITUTE
1211 Cathedral Street
Baltimore, Maryland 21201
Tel: 443.449.2287 Fax: 443.449.2290

June 17, 2019

Mr. James Ashley, Director
Jacqueline Kurth, Medical Resource Officer
Industrial Commission of Arizona
800 W. Washington Street
Phoenix, AZ 85007

Sent Via Email and First Class Mail

RE: Industrial Commission of Arizona (ICA) Staff Proposed Fee Schedule, Section VII

Dear Mr. Ashley and Ms. Kurth:

INTRODUCTION

The Physicians Research Institute (PRI) is a national organization headquartered in Baltimore, Maryland. PRI was created by state medical societies in 2016 order to address physician autonomy in the practice of medicine which was threatened by regulatory restrictions as well as by insurance companies and their legislative allies. PRI membership now includes well over 2/3 of the state medical societies in the United States.

PRI has been asked by its Arizona members to provide an analysis of whether the restriction on physician dispensing (single fill/10 day limitation) contained in the Proposed Fee Schedule is a permissible "reimbursement guideline" under the language contained in SB 1111. PRI engaged counsel on the legal issues involved and itself has extensive experience in other states (Maryland, Virginia, Pennsylvania, Alabama, Kentucky, Wisconsin, Illinois) on this same issue.

PRI has seen this one fill/day limitation play out across the country. With the exception of Pennsylvania, no state has imposed such a restriction in a non-opioid situation and only a handful have imposed a limitation on opioid dispensing. Indeed, most states which have addressed the opioid issue have imposed limitations on **both** the prescribing doctor and the dispensing doctor. This, of course is exactly what Arizona did in enacting Arizona Laws 2018, 1st Special Session, Chapter 1.

Doctors who prescribe and dispense medications are the best judges of what is beneficial to their patient. Dispensing doctors are able to ensure patient compliance which is often not the case when the patient fills (or doesn't fill) the prescription at the pharmacy. Whether to dispense a medicine and for how long is a decision for a treating doctor to make, not for a

legislative body which has never treated a patient and certainly not for a regulatory body such as the ICA when its own legislature has specifically refused such a limitation.

The Proposed Fee Schedule purports to follow the direction given by Senate Bill 1111. In fact, the proposal mimics the **original** version of SB 1111 and ignores the **amended** version which struck the original requirement for a single fill/day limitation in the dispensing of medicines by a doctor.

The single fill/day limit provision was stricken and it is clear from the Senate hearing that it would never have been approved by the Committee if it had remained (http://azleg.granicus.com/MediaPlayer.php?view_id=13&clip_id=20460). Indeed, Senator Fann, the sponsor of Senate Bill 1111, indicated at the Senate hearing her approval for an amendment striking the single fill/day limit language and that she was working with the Arizona Medical Association (ArMA) and had made a "commitment" to ArMA to strike the offending language if acceptable amendment could not be found (Senate hearing 1:40:20 – 1:40:43).

PRI's Conclusion: The single fill/day limit provision contained in the Proposed Fee Schedule is (1) contradicted by the clear legislative history of SB 1111 and (2) is legally indefensible as in violation of A.R.S. §32-1491, the statute which allows physician dispensing. These conclusions are discussed below.

LEGISLATIVE HISTORY OF SB 1111

SB 1111, as originally filed, contained a provision which imposed single fill/day(s) limit on physician dispensers. This provision was stricken as a result of the Senate hearing which featured testimony by a dispensing pain management physician and by a permanently disabled fireman and policewoman who both praised the practical necessity of receiving their medicines – including injections – in the dispensing doctor's office as opposed to a pharmacy. Their testimony struck a nerve with several senators who indicated that they would only support the bill if an appropriate amendment was made striking this portion of the bill (http://azleg.granicus.com/MediaPlayer.php?view_id=13&clip_id=20460). At the Senate hearing, Senator Fann agreed to an amendment striking the single fill/day limit language.

At the House hearing, Senator Fann explained that the single fill/day limit language had been stricken for compromise language which had the full support of the American Medical Association (AMA). Her brief testimony can be viewed at: http://azleg.granicus.com/MediaPlayer.php?view_id=13&clip_id=20855. Starting at 11:17 and ending at 12:48 (bold supplied):

> "Once again this is one of those bills that takes a lot of stakeholder meetings to get through it, but we did it. The first part of this bill is to conform the workmen's comp rules along with the governor's opioid bills that we did early in the sessions for our special session, so this brings us all in line. The second part of the bill, which really took the stakeholder meetings, and **I am very proud to announce, and very thankful the American Medical Association is now fine with the bill. We worked very closely with them**

> **to make sure we were not overstepping our boundaries.** The second part of the bill, what it deals with is some fraud that we were finding going on in workers comp. I know that's a big surprise to many of you, but we do have a small handful of doctors who apparently were prescribing a large number of opioids and some very costly ones. So we were able to work out this agreement to be able to bring the ICA in to make sure the patients and doctors were able to continue the treatment that they needed to but to be able to close this little loophole with that small handful of doctors who were kind of taking it to the extreme. **We have a lot of people here that would like to speak on it, so I won't belabor it but as I said I am very pleased to say the American Medical Association is now in support of.**"

At the Senate hearing, Senator Fann would say that "99% of our doctors are amazing great doctors" but that there is a "small handful" who are driven by greed. And, at the House hearing she was happy to announce that the amendment to the bill (ICA to propose "reimbursement guidelines") would "make sure the patients and doctors were able to continue the treatment that they needed...." Presumably this referred to patients like the permanently disabled fireman and policewoman who had testified in the Senate hearing that they had received appropriate medicines from their pain management doctor for a number of years.

Senator Fann was "proud" and "thankful" for the support she received from the AMA. To put it bluntly, the AMA **would never** support a single fill/day limitation for the dispensing of medicines by a physician. There is absolutely no clinical basis for such day limit proposals and organized medicine (both AMA and ArMA) are on record against them. Indeed, both organizations opposed such a proposal just months before the Arizona hearing on Senate Bill 1111.

The proposed 10 day limit is similar to that proposed in a "Model Bill" (single fill/7 day) from the National Conference of Insurance Legislators (NCOIL). The NCOIL "Model Bill" was approved in December 2018 and has, as of this time, never been filed in any state legislature. The American Medical Association (AMA) and the Arizona Medical Association (ArMA) both opposed the NCOIL provision limiting a dispensing doctor to a single fill of 7 days. See AMA House of Delegates Resolution from June 2018 opposing the NCOIL model bill and the letter from ArMA dated October 25, 2018 doing the same, both of which are attached.

The term "reimbursement guidelines" refers to fee schedule issues and not to the restriction of dispensing. For example, the ICA may decide to impose reimbursement limitations on medicines which are not available in a pharmacy and are being dispensed only by physicians ("non-traditional strength" dosages). This was an example mentioned in Senate testimony. The Proposed Fee Schedule addresses this issue in Section III.K.

Senator Fann's stated concern in her Senate testimony ("compound medications") is addressed in the Proposed Fee Schedule in Section V although, oddly enough, it does not appear to apply to a doctor but only to a pharmacy (see definition of "compound medication" at Section II.D).

LEGAL ANALYSIS

A.R.S. §32-1491 is the statute that grants physicians the right to dispense medicines. Doctors who desire to dispense must register and pay a registration fee pursuant to A.R.S. §32-14 36. Detailed records are required for each dispensed medicine.

Can A.R.S. §32-1491 be overridden? Quite obviously it can be, but only by the Arizona Legislature. The Legislature has the necessary power to regulate both physician prescriptive and dispensing powers as was done with the opioid legislation resulting from the recent Special Session. Arizona Laws 2018, 1st Special Session, Chapter 1. Indeed, the principal provisions of SB 1111 brought the workers' compensation law into compliance with the recently enacted opioid legislation.

A regulatory agency such as ICA cannot adopt a regulation or interpretation of a statute that contradicts the plain meaning of that statute or another statute. Arizona Dep't of Economic Security v. Leonardo, 200 Ariz. 74, 79-80 (2001); Dearing v. Arizona Dep't of Economic Security, 121 Ariz. 203, 206-07 (1978). The "reimbursement guidelines" language in SB 1111 appear in the "fee schedule" portion of the Workers' Compensation Statute where the word "reimbursement" is understandable and does not reference the independent statutory right to dispense contained in A.R.S. §32-1491.

Arizona is currently ranked number 40 in the authoritative Oregon Report (see http://www.physiciansresearchinstitute.org/oregon-report-2018-october-2018/). This means that Arizona workers' compensation premiums are substantially less expensive than almost all other states. There could be a number of reasons for this including an inadequate fee schedule for treating doctors. With respect to medicines, Arizona has the lowest reimbursement schedule of any state (85% of Original Manufacturers' Allowable Wholesale Price). Moreover, Arizona has a workers' compensation "formulary" which limits the medicines that may be routinely prescribed. PRI suspects that the net effect of these Arizona policies is that they discourage doctors from seeing injured workers. The current proposal will only operate to further drive doctors away from treating workers' compensation patients and reduce injured workers' choice of doctors.

If the Legislature had intended for the ICA to prescribe a one fill/day limit it would have done two things. First, it would have referenced §32-1491 and, second, it would have explicitly directed the ICA to consider a limitation on physician dispensers as the original version of Senate Bill 1111 proposed.

It is virtually a given that this proposed regulation will be interdicted once a lawsuit was filed. The basis of the lawsuit would be a bedrock rule of administrative law: a regulation may not trump a statute. Arizona State Board of Regents v. Arizona State Personnel Board, 195 Ariz. 173 (1999); Dioguardi v. Superior Court, 184 Ariz. 414 (1995). Indeed, the only direction given by SB 1111 was to consider "fee schedule" issues not restrictions on a doctor's scope of practice.

CONCLUSION

The Proposed Fee Schedule does address two issues mentioned in Senate testimony. The first being the use of "non-traditional strength" dosages by dispensing doctors which is regulated by Section III.K., and the second being "compound medication" which is regulated by Section V. In both cases, these are proper "reimbursement guidelines" under Senate Bill 1111 and they specify the methodologies for reimbursement and do not attempt to say that these medicines cannot be prescribed or dispensed.

The notion that Senate Bill 1111 directed the ICA to make a single fill/day limit a part of the Fee Schedule is simply wrong. The ORIGINAL Senate Bill 1111 had a single fill/day limits clause; this provision was stricken in favor of a direction for the ICA to consider "reimbursement guidelines." The current proposal for a single fill/day limit is not a "reimbursement guideline" any more than a proposal that dispensing doctors would not be paid at all is a "reimbursement guideline." Rather, it is a regulatory attempt to stop doctors from dispensing medicines even though they have a well-established statutory right to do. It imposes a day limit which the legislature refused to do and, as such, the ICA has exceeded its proper regulatory role.

Very truly yours

Joseph A. Schwartz, III
President

JAS:jsm

Attachments

cc: Kathy Senseman, Policy Development Group
Christina Sandefur, Executive Vice President, Goldwater Institute
Daniel Blaney-Koen, American Medical Association
Jon Amores, Arizona Medical Association
Rick Hazelton, Arizona Medical Association
PRI Board of Directors
PRI Members

(30) RESOLUTION 245 – OPPOSING NCOIL ATTEMPTS TO STOP PHYSICIAN DISPENSING

Madam Speaker, your Reference Committee recommends that Policy H-120.990 be amended by addition to read as follows:

Physician Dispensing H-120.990
Our AMA supports the physician's right to dispense drugs and devices when it is in the best interest of the patient and consistent with AMA's ethical guidelines.

Our AMA oppose legislative and other efforts that are in conflict with AMA policies concerning patient access to physician-dispensed drugs and devices.

ARIZONA MEDICAL ASSOCIATION

Traci Pritchard, MD, FACR
President

Libby McDannell, CAE
Executive Vice President

October 25, 2018

Mr. William Melofchik
Legislative Director
NCOIL National Office
2317 Route 34, Suite 2B
Manasquan, New Jersey 08736

Sent Via Email to wmelofchik@ncoil.org

Dear Mr. Melofchik,

Over the past 120 years, The Arizona Medical Association (ArMA) has been an advocate for all physicians, promoting the interests of patients and well-being of all Arizonans. On behalf of more than 4,000 physician members that ArMA represents, we are writing to express our opposition to the National Council of Insurance Legislators (NCOIL) Workers' Compensation Pharmaceutical Reimbursement Rates Model Act.

The Arizona Medical Association does not support the elimination of physician dispensing nor the restrictive conditions created by NCOIL's model act on physician dispensing. Allowing a physician to dispense only a single 7-day fill, only if an injured worker is seen within 7 days of an injury, proves to be setting burdensome and unrealistic limitations on physicians and patients.

The Arizona Medical Association supports providing care in the best interest of patients, which should be decided by physicians. This model act limits the ability of physicians to treat injured workers in office settings, as office dispensing is a practical way to insure patient compliance and recovery.

ArMA respectively requests, in the best interest of patients, that this model legislation as written not move forward.

Sincerely,

Marc Leib MD

Marc Leib, MD, JD
Chair, Legislative and Governmental Affairs Committee

William Thompson, IV, MD
Vice-Chair, Legislative and Governmental Affairs Committee

Tel 602.347.6900
Toll Free 800.482.3480
info@azmed.org
azmed.org
@azmedicine
@ArizonaMedicine